IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants	)	

DEFENDANTS' JOINT MOTION *IN LIMINE* REGARDING ANY REFERENCE TO PRIOR ATTEMPTS TO SETTLE AND INTEGRATED BRIEF

The Defendants respectfully move this Court, *in limine*, pursuant to Federal Rules of Evidence, 401, 402, 403 and 408 (a) and Local Civil Rule 16.2(i) to preclude any reference or testimony at trial regarding prior attempts to settle this dispute, or any others, between Plaintiffs and Defendants, or any one of them.

BACKGROUND

Public comments about settlement negotiations in this case have been made during the pendency of this case, including assertions by Plaintiffs that they were forced to sue the defendants because defendants refused to settle the case and take responsibility of the litter application in the Illinois River Watershed ("IRW"). These statements or ones like them made at trial would be contrary to the public policy promoting settlements, are irrelevant to the issues in the case and would be unfairly prejudicial to defendants. For these reasons, any such reference or

statements by any attorney, party or witness regarding any aspect of such negotiations or comments related to them should be excluded at trial.

ARUGUMENT

I. REFERENCES OR TESTIMONY REGARDING SETTLEMENT NEGOTIATIONS SHOULD BE EXCLUDED BECAUSE THEY VIOLATE THE POLICIES UNDERLYING RULE 408(a) OF THE FEDERAL RULES OF EVIDENCE

Rule 408(a) of the Federal Rules of Evidence states in part:

> (a) **Prohibited uses.**—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
> (2) conduct or statements made in compromise negotiations regarding the claim…

This rule exists to protect two public policies which are identified in the Advisory Committee Notes. The Notes state, "exclusion [of evidence of settlement] may be based upon two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position….[and] (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." Rule 408 Fed. R. Evid., Advisory Committee Note, 1972 Proposed Rules, 28 U.S.C.A. Rule 408 (West 2001).

The Advisory Committee also noted that these policies are further supported by the provisions in Rule 68 [Offer of Judgment] which prohibit the terms of an offer or the mere fact of an offer of judgment to be admitted as evidence. This recurrent theme in the both the civil procedure and evidence rules demonstrates the strength of the policy to promote resolution of cases short of trial.

Case law also supports this policy, "Rule 408 of the Federal Rules of Evidence states that 'evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.' This exclusionary rule reflects a well-recognized public policy in favor of non-litigious solutions to disputes, which is equally applicable to insurance litigation. See *Olin Corp. v. Insurance Co. of North America*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985)." *Southwest Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1257 (D. Colo. 2003)

The Northern District's Local Rules are also supportive the policy to shield settlement conversations. LCvR16.2 (i) requires all parties and the Settlement Judge to keep confidential all written and oral communications made in connection with or during any settlement conference and specifically prohibits their use at trial, unless permitted by Fed. R. Evid. 408. This Court is both cognizant and protective of the need for confidentiality in settlement situations in

keeping with the limitations of Rule 408. *See, Alexander v Phillip Morris USA, Inc.*, 2008 U.S. Dist. Lexis 51359 (N.D. OK., July 3, 2008)

In the present case there is no issue currently before the Court that would justify the presentation of any reference to or evidence from any settlement negotiations in which the parties have participated. Plaintiffs' public comments alleging that they were "forced to sue" the defendants because of an unwillingness to settle or take responsibility are clearly contrary to the policy promulgated by Rule 408. Plainly, there is no Rule 408 exception to be applied here and because such references or statements are a violation of the policies promoted by Rule 408 and LCvR 16.2(i), they should be prohibited.

II. REFERENCE TO OR TESTIMONY REGARDING SETTLEMENT NEGOTIATIONS SHOULD BE EXCLUDED BECAUSE IT IS IRRELEVANT

References or testimony regarding settlement would have no probative value at trial and must therefore be excluded. Federal Rule of Evidence 402 mandates that: "Evidence which is not relevant is not admissible." Further, "relevant evidence" is defined in Rule 401 as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

As noted in the Advisory Committee Notes to Fed. R. Evid. 408, mentioned above, evidence of compromise or settlement is irrelevant because its motivation can be a desire for an end to the litigation and has no connection with the merits of

a party's position. Because such statements or references, by any party, can have motivations other than the finding of the truth of the matter, for example, a political race or public relations, they have little if any probative value and therefore should be prohibited in all phases of a trial.

III. REFERENCE TO OR TESTIMONY REGARDING SETTLEMENT NEGOTIATIONS SHOULD BE EXCLUDED BECAUSE IT IS PREJUDICIAL AND SHOULD BE EXCLUDED UNDER FED.R.EVID. 403.

Even if any settlement references were to pass muster under Rule 408 and were relevant under Rule 401, they should still be excluded under Rule 403. The Tenth Circuit has long recognized that settlement statements can be prejudicial. "Permitting evidence of unsuccessful settlement negotiations also creates a very real potential for jury confusion and may suggest a decision on an improper basis. *See Weir v. Federal Insurance Co.*, 811 F.2d 1387, 1395 (10th Cir. 1987)." *Southwest Nurseries, LL v. Florists Mut. Ins., Inc.,* 266 F.Supp. 2d 1253, 1259 (D. Colo. 2003). Because of this potential prejudice the trial could become longer. As noted by the *Southwest Nurseries* court:

> At trial, a party's settlement offer could not be considered in a vacuum, but rather would have to be evaluated in the full context of settlement negotiations. That would necessarily involve testimony explaining negotiation strategies and the thought processes of the settlement participants. The parties might well feel compelled to offer testimony from their respective counsel to explain their settlement strategies and the rationale for any offers or counter-offers. Jury confusion seems inevitable. *Cf. Equal Employment Opportunity Commission v. Gear Petroleum, Inc.,* 948 F.2d 1542, 1546 (10th Cir. 1991) ("The risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 require[s] exclusion even when a

> permissible purpose can be discerned"). Here, the potential for unfair prejudice and jury confusion far outweighs the probative value of evidence concerning settlement negotiations.

Id.

As the possibility of prejudice is very real and allowing references to settlement will potentially create the need for additional testimony to place such references into context, any such references should be prohibited.

CONCLUSION

For the reasons that references to or testimony regarding settlement negotiations is contrary to the policies supported by Rule 408 and LCvR 16.1, are irrelevant under Rules 401 and 403, and prejudicial under Rule 403, Defendants' Motion *in Limine* should be granted and all such references or testimony should be prohibited.

Respectfully submitted,

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